

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

CITY OF WILMINGTON, DELAWARE,

AND

**AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 81, LOCAL 1102.**

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Representation Petition
99-06-260

RE: Wilmington Police Department Records Coordinator
and the Executive Assistant to the Chief of Fire

Appearances

John Morgan, Esq., Assistant City Solicitor, for the City of Wilmington
LaTonya Barnes, for AFSCME Council 81

The City of Wilmington, Delaware (“City”), is a public employer within the meaning of §1302(n) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1994). ¹

The American Federation of State, County and Municipal Employees, Council 81 (“AFSCME”), is an employee organization within the meaning of 19 Del.C. §1302(h). ²

AFSCME Local 1102 is the exclusive bargaining representative of a bargaining unit of City of Wilmington employees as defined by the Department of Labor in cases #36, #43, and #51. This

¹ “Public employer” or “employer” means the State, any county of the State or any agency thereof, and/or any municipal corporation, municipality, city or town located within the State or any agency thereof, which upon the affirmative legislative act of its common council or other governing body had elected to come within the former Chapter 13 of this title, which hereinafter election to come within this Chapter, or which employs 100 or more full-time employees.

² “Employee organization” means any organization which admits to membership employees of a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative, or agent of said organization.

unit is commonly referred to by the parties as a unit of “technical, clerical and supervisory” employees.

On June 25, 1999, AFSCME filed with the Public Employment Relations Board (“PERB”) a Petition for Amendment or Clarification of Existing Certified Bargaining Unit, seeking to include in the Local 1102 bargaining unit the unrepresented positions of Wilmington Police Department Records Coordinator and Executive Assistant to the Chief of the Wilmington Fire Department.

The City objected to the inclusion of the WPD Records Coordinator asserting this is a supervisory position within the meaning of 19 Del.C. §1302(p) and to the inclusion of the Executive Assistant to the Chief of Fire on the basis that this is a confidential position within the meaning of 19 Del.C. §1302(e). The City also objected to the filing of the petition arguing it failed to meet the requirements of PERB Regulation 3.4(8).

A hearing was convened on September 10, 1999, at which time the parties were afforded full opportunity to present evidence in support of their positions. The record closed upon receipt of oral argument at the conclusion of the hearing. This decision results from the record created by the parties in this matter.

ISSUE

- I. Whether this bargaining unit modification petition is properly filed within the meaning of PERB Regulation 3.4(8)?

- II. Whether the Wilmington Police Department Records Coordinator is a “supervisor employee” within the meaning of 19 Del.C. §1302(p) and therefore ineligible for representation by AFSCME Local 1102?
- III. Whether the Executive Assistant to the Chief of the Wilmington Fire Department performs confidential duties within the meaning of 19 Del.C. §1302(e) and is therefore ineligible for representation by AFSCME Local 1102?

OPINION

I. Appropriateness of the petition

The Public Employment Relations Board (“PERB”) has broadly construed the right of employees to petition to be represented for purposes of collective bargaining as a fundamental right under the Public Employment Relations Act (“PERA”, 19 Del.C. Chapter 13). In RE: U.D. Bus Drivers, Del.PERB, Rep. Pet. 95-04-126, II PERB Binder 1210 (1995).

PERB Regulation 3.4(8) states:

Modification of a Bargaining Unit: In the event there is a substantial modification in the nature of the duties and working conditions of a position, or a new position is created which is not covered by an existing bargaining unit definition, or there is some other compelling reason for the Board to consider modifying the designated bargaining unit, the public employer and/or the exclusive bargaining representative may file a petition with the Board ...

The Public Employment Relations Board has held a compelling reason exists to consider a modification petition where public employees who are not represented for purposes of collective bargaining seek to exercise their statutory right to seek representation as part of an existing bargaining unit through the unit modification process. In RE: Dover Police Department Lieutenants and FOP Lodge 15, Del.PERB, Rep. Pet. 98-08-242, III PERB Binder 1831 (1999).

Accordingly, this bargaining unit modification petition is properly filed as required by PERB Regulation 3.4(8).

II. Supervisory Status of Wilmington Police Department Records Coordinator

The Public Employment Relations Act (19 Del.C. Chapter 13) excludes supervisory employees from inclusion in any bargaining unit for purposes of collective bargaining. The City asserts the Wilmington Police Department Records Coordinator is a supervisory employee within the meaning of §1302(p), which defines a supervisory employee to be:

... any employee of a public employer who has authority, in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such actions, if the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The supervisory exclusion was implemented as part of the PERA on September 24, 1994. Supervisory positions which were included in bargaining units prior to this date were allowed to remain represented under a grandfathering provision in the Act. 19 Del.C. 1302(m)(7); 19 Del.C. §1310(d). It is, therefore, irrelevant to any consideration of supervisory status whether similarly defined or compensated positions are included in an existing bargaining unit definition where that unit was created prior to the effective date of the statute.

The statute does not require that a supervisory employee perform all of the functions enumerated in the definition. Consequently, the Hearing Officer is required to determine the extent to which the position performs any of the enumerated functions. In doing so, PERB has adopted the following test: Does an employee in this position have the authority to engage in one or more of the twelve listed activities? Specifically, does this position have the authority to either, "... hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them or adjust their grievances?

- If so, does the exercise of this authority require the use of independent judgment?
- Does the employee hold this authority in the interest of the public employer?
NLRB v. Health Care and Retirement Corporation, (114 S.Ct. 1778, 146 LRRM 2321 (1994).

The WPD Records Coordinator reports directly to the Police Captain who commands the Support Services Division. The Records Coordinator evaluates and monitors the work of three permanent positions for which AFSCME Local 1102 is the exclusive bargaining representative. It is undisputed that the Records Coordinator is responsible for overseeing the work of temporary employees, summer youth workers and co-op positions who work in the Records Office. The incumbent Records Coordinator testified she has authority to use independent judgment in disciplining, terminating, assigning and directing the work of this group of employees. She can directly affect their levels of compensation by modifying the hours each of these employees works. The incumbent Records Coordinator testified she possesses essential authority and exercises independent judgment in the interest of the City in supervising these employees.

In defining supervisory functions, the statute does not differentiate between permanent employees and temporary, seasonal and/or durational employees. Based on the record established by the parties, it is clear that the Records Coordinator is a supervisory employee within the meaning of 19 Del.C. §1302(p) and is therefore ineligible for representation under the Public Employment Relations Act.

III. Confidential Status of the Assistant to the Chief of Fire

The Public Employment Relations Act denies the rights of organization and representation to public employees who are “confidential” within the meaning of 19 Del.C. §1302(e).

“Confidential employee” means any employee whose essential job function and advanced knowledge about the issues involved in collective bargaining would make it unduly burdensome for the employer to negotiate effectively if the employee were a member of an appropriate bargaining unit.

This confidential exclusion protects both the employer and the employees from inherent conflicts of interest which involve “the issues involved in collective bargaining.” The test for

confidentiality is whether that function or knowledge unduly compromises the employer's ability to effectively negotiate. In RE: Capital School District Benefits Specialist, Del.PERB, Rep. Pet. 94-09-103, II PERB Binder 1175 (1995).

A determination of confidentiality is dependent upon the specific facts of each case. The PERB set forth the following standard for reviewing the evidence in reaching a confidentiality determination in the Capital S.D. Benefits Specialist (Supra), decision:

In determining confidential status, the facts of each case must be examined to determine for whom the employee works, what that employee does and what knowledge and/or exposure the employee has to issues involved in collective bargaining. Finally a determination must be made as to whether, based upon the essential job functions and advanced knowledge regarding collective bargaining, the inclusion of the position within a bargaining unit compromises the employer's negotiating positions and make it unduly burdensome for the employer to effectively negotiate.

The position of Executive Assistant to the Chief of Fire was created and classified as a civilian position on or about July 1, 1998. Prior to that time, a uniformed officer serve as the "Chief's Aide". The collective bargaining agreements between the City and IAFF Local 1590 (which represents the City's firefighters in the ranks of Firefighter through Battalion Chief) includes the following provision:

... the employee holding the confidential position of Chief's Aide shall be excluded from the bargaining unit regardless of the rank of the individual employee. [Article 2.1]

This contractual language is clear on its face. During the period of time a uniformed officer served as the Chief's Aide, he or she was excluded from the bargaining unit and was not, therefore, covered by the terms of the collective bargaining agreement.³

The inclusion of this contractual language does not presume that if the functions of the Chief's Aide position were evaluated against the statutory confidentiality definition, that position would automatically be found to be confidential. The issue of the confidentiality of the Chief's Aide has never been considered by the PERB. Indeed, because that position was held by a

³ Whether or not that individual chooses to maintain his or her membership in the IAFF during the period of time he or she serves as the Chief's Aide is a separate issue and is not relevant to these proceedings.

uniformed firefighter, it was covered by a separate statute (Police Officers' and Firefighters' Employment Relations Act, 19 Del.C. Chapter 16) which does not define "confidential employee" and does not exclude "confidential employee" from eligibility for representation.

The Fire Chief testified the Executive Assistant position was intended to replace the uniformed Aide. It is undisputed the Chief has not filled the Aide position since an Executive Assistant was hired in August, 1998. The contractual language concerning the Chief's Aide, however, remains in the collective bargaining agreement between the City and the IAFF which was negotiated subsequent to the creation and filling of the Executive Assistant position. This raises a question as to whether the Chief retains the authority to designate a uniformed officer to serve as Chief's Aide at some point in the future.

It is also uncontested the Executive Assistant and Chief's Aide position are not identical. As a uniformed officer, the Chief's Aide has additional authority and responsibilities which cannot be performed by a civilian employee. The Executive Assistant cannot stand as the Chief's liaison or coordinator at a fire scene, because it is not within the command structure of the Department. (*testimony of Chief Wilmore*). The Chief testified he sought to create a civilian position in response to a high turnover rate of the uniformed Aides and in order to gain greater computer expertise which he felt he needed within his office. As required by the job description the incumbent Executive Assistant has "extensive computer processing experience".

The first civilian Executive Assistant to the Chief of Fire was hired in August, 1998. Collective bargaining negotiations between the City and IAFF Local 1590 began in September, 1998. The City's negotiation team included (from the Fire Department) the Chief, two Deputy Chiefs, and the Executive Assistant. The Chief testified he included the Executive Assistant on the City's team and expected her to attend all negotiation sessions. He later excused her from the team, at her request, to allow more time for her other job duties. The Chief did not replace her on

the negotiating team. The Executive Assistant testified she attended five or six negotiating sessions, primarily to take notes for the Chief. During these sessions she attended the City team's closed caucuses as well as the negotiating sessions. The Executive Assistant is not involved in grievance or complaint processes involving either the IAFF or AFSCME Local 1102.⁴ Furthermore, there is no dispute that neither the Chief nor his designee has served on the City's negotiations with AFSCME Local 1102.

In applying the confidential exclusion, the burden is on the party asserting its applicability to show that a position's "essential job function and advance knowledge about the issues involved in collective bargaining" create an "undue burden on the employer's ability to effectively negotiate. Capital Benefits Specialist, Supra. The evidence presented is not sufficient to support a conclusion that the Executive Assistant to the Chief serves an essential function in the Department in collective bargaining. In addition to the Chief, two Deputy Chiefs serve on the City's team. During the most recent negotiations, the Executive Assistant's excusal from the team did not impair the forward progress of the negotiations. No evidence was presented that Ms. Flowers served any essential collective bargaining function external to the negotiations. Although it may be convenient for the Chief to have an additional member of his staff involved in negotiations, the statute establishes that the test is one of essentiality.

The statute further requires proof that if the employee in question were a member of an appropriate bargaining unit, it would be create an undue burden for the employer to negotiate effectively. The record in this matter contains no probative evidence concerning nature or consequence of the burden the City assumes if the Executive Assistant becomes part of the Local 1102 bargaining unit.

⁴ The City's reliance on the prior Chief's Aide serving as the City's designated observer during a PERB election is misplaced. PERB rules do not require that an election observer have a role in collective bargaining or otherwise serve in any sort of confidential function under the statute. Election observers are required only to be familiar with eligible voters so as to be able to identify them on sight.

For these reasons, the Executive Assistant to the Chief of Fire is found not to be a confidential employee within the meaning of 19 Del.C. §1302(e).

DECISION

For the reasons set forth herein, it is determined that this modification petition is properly filed under the requirements of PERB Regulation 3.4(8) because it involves a group of employees who are seeking to exercise their statutory right to petition for representation for the purposes of collective bargaining.

The Records Coordinator of the Wilmington Police Department is a supervisory employee within the meaning of 19 Del.C. §1302(p) and is therefore ineligible for representation for the purposes of collective bargaining.

The Assistant to the Chief of the Wilmington Fire Department is not a confidential employee within the meaning of 19 Del.C. §1302(e).

The City did not object to the appropriateness of this position being included in the AFSCME Local 1102 bargaining unit. Consequently, because this is a single incumbent position and the incumbent indicated her desire to be represented for purposes of collective bargaining by Local 1102, there is no need to conduct a representation election for a single employee.

WHEREFORE, the bargaining unit represented by AFSCME Local 1102 is hereby modified to include the position of Executive Assistant to the Chief of Fire.

IT IS SO ORDERED.

/s/Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
PERB Hearing Officer

DATED: 15 November 1999